

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2020-263-E

Cherokee County Cogeneration)	
Partners, LLC)	
)	
Complainant/Petitioner,)	DIRECT TESTIMONY OF
)	MICHAEL KEEN
v.)	ON BEHALF OF DUKE ENERGY
)	CAROLINAS, LLC AND DUKE
)	ENERGY PROGRESS, LLC
Duke Energy Progress, LLC and)	
Duke Energy Carolinas, LLC,)	
)	
Defendants/Respondents.)	

I. INTRODUCTION AND PURPOSE

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Michael Keen and my business address is 299 1st Ave. N., St. Petersburg, Florida 33701.

Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A. I am employed by Duke Energy Business Services ("DEBS") as a Business Development Manager. As an employee of DEBS, I allocate my time among Duke Energy Carolinas, LLC ("DEC"), Duke Energy Progress, LLC ("DEP", and together with DEC, the "Companies") and Duke Energy Florida, LLC ("DEF"). I negotiate and structure PURPA and non-PURPA purchase power agreements for DEC, DEP, and DEF. In addition, I manage an existing purchase power portfolio of approximately 4,000 megawatts ("MW").

Q. PLEASE BRIEFLY SUMMARIZE YOUR EDUCATIONAL AND PROFESSIONAL EXPERIENCE.

A. In 1987, I received a Bachelor of Science in Mechanical Engineering from University of South Florida. In 1993, I received a Master's in Business from Florida Institute of Technology. I joined Florida Power Corporation as a cooperative education student in 1984. Upon graduation in 1987, I became a full-time employee of Florida Power. I worked in the power plant side of the business for the next 12 years. In 1996, I became an energy trader for Florida Power. In 1998 I was promoted to business development manager. I have been negotiating PURPA and non-PURPA power purchase agreements and managing existing agreements in the Carolinas and Florida for the last 23 years.

Specific to this Complaint proceeding, I have had direct responsibility for the business relationship with Cherokee Cogeneration Partners, LLC (“Cherokee”) for approximately eight years and primary responsibility for the Companies’ negotiations with Cherokee and its parent LS Power, Inc. (“LS Power”).

Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA?

A. No. I have not.

Q. ARE YOU INCLUDING ANY EXHIBITS IN SUPPORT OF YOUR TESTIMONY?

A. Yes. I am sponsoring three exhibits:

- **DEC/DEP Keen Direct Exhibit 1** is the timeline of the Companies’ communications with Cherokee.
- **Confidential DEC/DEP Keen Direct Exhibit 2** includes 21 attachments supporting the timeline of communications presented in my Exhibit 1. Several of the attachments contain confidential information and are being filed under seal.¹
- **Confidential DEC/DEP Keen Direct Exhibit 3** is the PURPA Term Sheet for a new 10-Year PPA offered to Cherokee on February 10, 2021. The pricing presented in this term sheet is commercially sensitive and confidential and is being filed with the Commission under seal.

¹ DEC/DEP Keen Direct Exhibit 1 & Confidential DEC/DEP Keen Direct Exhibit 2 were previously filed with the Commission as DEC/DEP Late-Filed Exhibit 2 on December 15, 2020, in response to Commissioner Williams’ request at the December 10, 2020 hearing on Cherokee’s Request for Interim Relief. DEC/DEP Keen Direct Exhibit 1 contains one ministerial correction from the previously filed version.

1 **Q. WERE THESE EXHIBITS PREPARED BY YOU OR AT YOUR**
2 **DIRECTION AND UNDER YOUR SUPERVISION?**

3 A. Yes.

4 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS**
5 **PROCEEDING?**

6 A. The purpose of my testimony is to respond to the testimony of Cherokee Witness
7 Nathan Hanson regarding the negotiations that took place between Cherokee/LS
8 Power and each of the Companies for a new power purchase agreement (“PPA”)
9 beginning in the summer of 2018. My testimony will begin by providing some
10 background on cogeneration facilities, generally, and Cherokee’s facility,
11 specifically. I will then explain the most recent PPA between Cherokee and DEC,
12 which was executed by the parties in 2012. Most importantly, I will describe and
13 provide context on the negotiations between the parties towards a new PPA that
14 began in 2018 and continues in parallel with this Complaint proceeding. As my
15 testimony will demonstrate, both DEC and DEP have engaged in good faith
16 negotiations and have been consistently responsive to LS Power’s requests for
17 avoided cost rates, PPAs, and other information from DEC and DEP on behalf of
18 Cherokee. Last, I will respond to certain issues raised by Witness Hanson related
19 to the relationship between the parties, including by explaining the differing
20 capacity need between DEC and DEP and commenting on the pros and cons to a
21 dispatchable tolling agreement.

22 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF YOUR TESTIMONY.**

23 A. My testimony—along with the testimony of the Companies' other witnesses, Glen

1 Snider, Kendal Bowman, and John Freund— shows that the Companies acted in
2 good faith to negotiate with Cherokee and LS Power in the interests of the
3 Companies’ customers and in a manner consistent with PURPA and the
4 Commission’s orders implementing PURPA. Put simply, Cherokee demanded, and
5 still demands, to be paid prices for its capacity and energy that are inconsistent with
6 PURPA and the Commission’s previous orders addressing avoided cost under
7 PURPA and that are far in excess of the Companies’ actual avoided costs and what
8 is just and reasonable for our customers to pay. It is widely known in the industry
9 that the cost of energy significantly declined over the past decade, triggering a
10 similar reduction in the Companies’ avoided costs. The rates offered to Cherokee
11 also reflect that DEC does not have an immediate need for additional capacity to
12 serve its customers beginning in 2021. Unfortunately for Cherokee, the Cherokee
13 Facility seemingly requires rates two to three times in excess of the Companies’
14 avoided cost rates to be profitable. While the Companies are sympathetic to this
15 position, they do not have flexibility under PURPA, or this Commission’s previous
16 orders, to offer rates in excess of their avoided costs.

17 **II. BACKGROUND OF RELATIONSHIP BETWEEN CHEROKEE, LS**
18 **POWER, AND DEC**

19 **Q. PLEASE DESCRIBE THE CHEROKEE FACILITY.**

20 A. The Cherokee Facility is a 98 MW combined cycle cogeneration power generating
21 qualifying facility (“QF”) located in Gaffney, South Carolina (the “Cherokee
22 Facility” or the “Facility”). As a cogeneration plant, the Cherokee Facility

1 produces both usable heat and power simultaneously. Historically, Cherokee has
2 sold the Facility's energy and capacity to DEC under a long-term PURPA contract
3 while providing steam to its industrial neighbor and partner, Reddy-Ice.

4 **Q. PLEASE DESCRIBE LS POWER.**

5 A. LS Power owns and operates the Cherokee Facility. LS Power is a sophisticated
6 and experienced player in the power sector, having "developed, financed,
7 constructed, managed and acquired more than 42,000 MW of competitive power
8 generation and over 630 miles of transmission infrastructure" across North
9 America.² LS Power has raised in excess of \$45 billion in debt and equity financing
10 to support its North American infrastructure.³ LS Power acquired the Cherokee
11 Facility from NextEra Energy Resources, LLC in September 2011. LS Power's
12 headquarters are located at 1700 Broadway, 35th floor, New York, NY.

13 Importantly, Cherokee is managed by individuals who hold titles in both
14 companies. Witness Hanson, for example, holds the title "Senior Vice President"
15 for both LS Power and Cherokee.

16 **Q. CAN YOU PROVIDE ADDITIONAL BACKGROUND INFORMATION ON**
17 **COGENERATION FACILITIES?**

18 A. Yes. Cogeneration is the simultaneous production of two or more forms of energy
19 from a single fuel source. In most circumstances, cogeneration facilities take what
20 would otherwise be wasted heat to produce an additional energy benefit. In
21 Cherokee's case, extracted steam is transferred to the adjacent Reddy-Ice

² See www.lspower.com/about-us (last visited May 18, 2021).

³ *Id.*

1 manufacturing facility, as discussed by Witness Hanson.⁴

2 **Q. WHEN DID CHEROKEE FIRST CONTRACT WITH DEC FOR THE**
3 **PURCHASE OF ENERGY AND CAPACITY AT THE CHEROKEE**
4 **FACILITY?**

5 A. DEC first contracted to purchase energy and capacity from the Cherokee Facility
6 in 1994, when it executed a 15-year non-dispatchable PPA with Cherokee that was
7 structured as a conventional “must-take” PURPA agreement (the “1994 PPA”). By
8 Amendment, the term of the 1994 PPA began on November 2, 1998 when the
9 Facility first commenced commercial operations. The successor PPA between the
10 two Companies was executed on June 28, 2012 for a 7.5-year term set to terminate
11 on December 31, 2020, as approved by the Commission in Order No. 2012-743
12 (the “2012 PPA”). The 2012 PPA was structured as a dispatchable tolling
13 agreement whereby DEC provided the fuel and dispatched the Facility in return for,
14 among other things, a fixed monthly capacity payment to Cherokee based upon
15 DEC’s avoided costs under PURPA.

16 **Q. PLEASE EXPLAIN HOW A DISPATCHABLE TOLLING AGREEMENT**
17 **DIFFERS FROM THE STRUCTURE OF A MORE TRADITIONAL MUST-**
18 **TAKE PPA LIKE THE TERMS TYPICALLY INCLUDED IN THE**
19 **COMPANIES’ LARGE QF PPA.**

20 A. The primary difference between a traditional, must-take PPA and a tolling
21 agreement is whether the seller (here, Cherokee) or the buyer (here, DEC) decides

⁴ The Companies understand that LS Power owns the land and facility occupied by Reddy Ice, but do not know the quantity of steam supplied by Cherokee to Reddy Ice, the purpose for which the steam is used, or the amount paid by Reddy Ice to Cherokee in return for the steam.

1 when to run the facility and generate electricity. Under a traditional, must-take
2 PPA, the seller generates electricity at its discretion by securing fuel, converting it
3 to electricity, and delivering it to the buyer who is obligated to purchase at fixed
4 hourly rates based on the utility's avoided costs. Conversely, under a dispatchable
5 tolling agreement the *buyer* determines when the facility will generate electricity
6 by purchasing and delivering fuel to the facility.

7 Most PURPA PPAs in the Carolinas are structured as must-take
8 agreements, including the 1994 PPA between Cherokee and DEC. This is also the
9 standard form of PPA used for PURPA transactions with QFs larger than 2 MW
10 approved by this Commission (the "Large QF PPA").⁵ The Companies' Large QF
11 PPA is a must-take agreement.

12 **Q. HAS THE 2012 PPA EXPIRED?**

13 A. Technically, yes. The contract expired on December 31, 2020. However, the
14 Commission has twice extended the term of the contract during the pendency of
15 this Complaint proceeding. Because of the recent decline in energy costs and
16 changes in the Companies' need for new capacity, as addressed by Mr. Snider,
17 avoided cost rates in any new PPA between the parties are certain to be lower than
18 the 2012 PPA rates. I also understand that the Commission has reserved the right
19 to order that DEC's payments to Cherokee beginning January 1, 2021 are subject
20 to a true-up, with the expectation that Cherokee will return the overpayment once
21 the applicable new avoided cost rate is set.

⁵ See Order No. 2019-881(A), Docket Nos. 2019-185-E and 2019-186-E (Jan. 2, 2020).

III. NEGOTIATIONS FOR A NEW PPA BETWEEN CHEROKEE AND DEC AND DEP

Q. PLEASE GIVE A BRIEF OVERVIEW OF THE NEGOTIATION PROCESS WITH CHEROKEE.

A. DEC and DEP engaged in good faith negotiations with Cherokee and LS Power for a new PPA from 2018 to present. During that time period, Cherokee pursued three different, but overlapping, avenues in an attempt to negotiate rates higher than the Companies' actual avoided costs: (1) participation in a non-PURPA DEP market solicitation in the fall of 2018; (2) engaging in negotiations with DEC beginning in September 2018 for a new PPA; and (3) engaging in negotiations with DEP for a PPA beginning in December 2018. According to the testimony of Cherokee Witnesses Hanson and Strunk, higher rates were needed to ensure the continued viability of its business, and Cherokee availed itself of all options

As I describe below, the Companies were consistently responsive to LS Power's requests for information to support their rate calculations, and attempted to work with them on all three quasi-parallel paths in good faith. To support my testimony on the negotiations between DEC, DEP and LS Power (on behalf of Cherokee), I am attaching the Timeline of Communications between the Companies and Cherokee as **DEC/DEP Keen Direct Exhibit 1**. This document, which was prepared by the Companies based on their records, illustrates the progression of negotiations between the parties. **Confidential DEC/DEP Keen Direct Exhibit 2** contains the 21 supporting Attachments referenced in the Timeline of Communications. Importantly, Exhibit 1 and my testimony below

1 demonstrate clearly that the Companies prioritized execution of a PURPA-
2 compliant successor PPA for the Cherokee Facility and did not obstruct
3 negotiations as Witness Hanson claims or “refuse to negotiate in good faith” as
4 alleged in the Complaint.

5 (A) **Cherokee Pursued Successor PPAs with Both DEC and DEP, but**
6 **Refused to Accept Avoided Cost Rates or Otherwise Meaningfully**
7 **Negotiate with Either Company**

8 **Q. WHEN DID THE PARTIES FIRST BEGIN NEGOTIATIONS FOR A**
9 **SUCCESSOR PPA?**

10 A. Discussions regarding a successor PPA for the Cherokee Facility began in July
11 2018—nearly two and a half years before the scheduled termination date of the
12 2012 PPA—when I contacted Cherokee to request a site visit. On July 25, 2018, I
13 visited the Cherokee Facility and met with Billy Pruitt, Cherokee Facility Manager,
14 and Aaron Pupa, Manager of Origination and Power Marketing for LS Power.⁶ The
15 purpose of this visit was twofold: (1) to tour the Facility and meet the folks that
16 operate and maintain the power plant; and (2) to discuss alternatives for the Facility
17 following expiration of the 2012 PPA on December 31, 2020.

18 1. **PURPA Negotiations with DEC (Fall 2018)**

19 **Q. AFTER THE SITE VISIT, DID CHEROKEE INITIATE NEGOTIATIONS**
20 **FOR A SUCCESSOR PPA WITH DEC?**

21 A. Yes. Two months after the site visit, on September 18, 2018, Cherokee delivered
22 a letter to DEC asserting its intent to sell energy and capacity to DEC under PURPA

⁶ DEC/DEP Keen Direct Exhibit 1, at 1.

1 and attaching a Notice of Commitment (“NOC”) form and FERC Form 556.⁷
2 According to Cherokee, the letter and corresponding attachments established a
3 legally enforceable obligation (“LEO”) requiring DEC to purchase energy and
4 capacity from the Cherokee Facility based upon DEC’s avoided cost rates as of the
5 date of the letter.

6 I promptly responded on behalf of DEC by letter dated October 5, 2018 and
7 promised to “negotiate in good faith towards a new agreement to purchase the full
8 output of the Facility.”⁸ In addition, I explained that DEC disputed that Cherokee’s
9 letter and attachments were sufficient to create a LEO under PURPA. My response
10 letter is included as Attachment 3 to my Exhibit 2. As a threshold matter, the Notice
11 of Commitment form was available only to QFs generating *two (2) megawatts or*
12 *less* and was thus inapplicable to very large cogeneration QFs like the Cherokee
13 Facility. Consistent with the process described in my response letter and further
14 discussed by Witnesses Bowman and Snider, DEC agreed to provide Cherokee
15 indicative pricing based upon DEC’s forecasted avoided costs calculated as of
16 September 2018 and to commence negotiation of a PPA just as Cherokee requested.

17 I further committed that DEC would circulate its avoided cost rates along
18 with a form PPA on or about October 31, 2018, and instructed Cherokee that the
19 pricing offer would expire 60 days after the date of delivery. My letter made clear
20 that the 60-day window would allow the parties to finalize any needed negotiations
21 regarding the form of PPA.

⁷ *Id.*; Confidential DEC/DEP Keen Direct Exhibit 2, Attachment 1.

⁸ DEC/DEP Keen Direct Exhibit 1, at 1; Confidential DEC/DEP Keen Direct Exhibit 2, Attachment 3.

1 **Q. DID DEC DELIVER ITS AVOIDED COSTS RATES AND FORM PPA BY**
2 **OCTOBER 31, 2018?**

3 A. Yes. On October 31, 2018 I sent a letter to LS Power which included DEC's
4 calculated avoided cost rates and a form PPA.⁹ The letter confirmed that the offered
5 rates were based upon DEC's September 2018 system costs and levelized over a
6 five-year term beginning January 1, 2021. Importantly, I explained that DEC's
7 offer *did not* include a capacity component because DEC's then-current integrated
8 resource plan ("IRP") did not identify a capacity need until 2028. Witness Snider
9 provides additional detail on DEC's capacity needs and the associated IRPs. The
10 rates were set to expire on December 31, 2018 (60 days after delivery).

11 **Q. DID CHEROKEE ACCEPT DEC'S OFFER?**

12 A. No. Rather than engaging in negotiations regarding the PPA that I provided on
13 behalf of DEC, Cherokee submitted an unsolicited term sheet to DEC on December
14 7, 2018.¹⁰ At less than half a page, the short term sheet proposed simply that the
15 successor PPA should be a carbon copy of the 2012 PPA with updated rates for
16 both energy *and* capacity. Not only did Cherokee's term sheet completely disregard
17 DEC's lack of capacity need for the new 7.5 year term Cherokee proposed, but it
18 included pricing well above DEC's actual avoided costs.

19 **Q. HOW DID DEC RESPOND TO CHEROKEE'S TERM SHEET?**

20 A. Just two weeks after receiving the unsolicited term sheet, I contacted Cherokee on
21 behalf of DEC to reject the unsolicited term sheet as inconsistent with PURPA.¹¹

⁹ DEC/DEP Keen Direct Exhibit 1, at 1; Confidential DEC/DEP Keen Direct Exhibit 2, Attachment 4.

¹⁰ DEC/DEP Keen Direct Exhibit 1, at 2; Confidential DEC/DEP Keen Direct Exhibit 2, Attachment 5.

¹¹ DEC/DEP Keen Direct Exhibit 1, at 2; Confidential DEC/DEP Keen Direct Exhibit 2, Attachment 8.

1 In my letter, I reiterated that DEC was not actively pursuing any non-PURPA
2 capacity and stated that the proposed pricing was both “well above DEC’s avoided
3 costs and well above the market price for capacity delivered into DEC.”

4 **Q. DID CHEROKEE LET THE OCTOBER 31, 2018 OFFER EXPIRE?**

5 A. Yes. DEC’s offer expired on December 31, 2018, 60 days after the offer was issued
6 to Cherokee. Because Cherokee failed to execute the agreement within the 60-day
7 period, the offer expired, along with Cherokee’s right to the avoided cost rates
8 provide in October 2018.

9 2. DEP Market Solicitation (Fall 2018)

10 **Q. DID CHEROKEE ALSO ATTEMPT TO SELL ENERGY AND CAPACITY**
11 **TO DEP PURSUANT TO A NON-PURPA CAPACITY SOLICITATION?**

12 A. Yes. Less than a week after Cherokee’s September 18, 2018 letter purporting to
13 establish a LEO for the purchase of “all capacity and energy associated with the
14 Facility to DEC as of January 1, 2021[,]”¹² Cherokee submitted a Proposal in
15 response to DEP’s non-PURPA Capacity and Energy Market Solicitation (“DEP
16 2018 Capacity Solicitation”) seeking bids for approximately 2,000 MW of firm
17 dispatchable capacity beginning in 2020.

18 **Q. WAS CHEROKEE’S PROPOSAL SUCCESSFUL?**

19 A. No. DEP received approximately twenty proposals from nine different suppliers,
20 including Cherokee. Cherokee’s proposal was the least competitive as it was the
21 highest of any bid submitted and almost three times higher than the best bid offered.
22 DEP ultimately awarded contracts to five separate bidders.

¹² DEC/DEP Keen Direct Exhibit 1, at 1; Confidential DEC/DEP Keen Direct Exhibit 2, Attachment 2.

1 3. PURPA Negotiations with DEP (Winter 2018-Spring 2019)

2 **Q. WHEN DID CHEROKEE INITIATE NEGOTIATIONS WITH DEP FOR A**
3 **PURPA-BASED PPA?**

4 A. Following its non-competitive Proposal in response to the DEP 2018 Market
5 Solicitation and its purported commitment to sell all of its output to DEC, Cherokee
6 then delivered a letter to DEP on December 12, 2018, asserting its intent to sell “all
7 capacity and energy associated with the Facility to DEP as of January 1, 2021” and
8 attaching an NOC Form and FERC Form 556.¹³

9 **Q. IS IT POSSIBLE FOR A QF TO SELL ITS FULL CAPACITY AND**
10 **ENERGY OUTPUT TO BOTH DEC AND DEP?**

11 A. No. If Cherokee is committing to sell its full output to DEC, there would be no
12 remaining output to send to DEP (and the reverse is true, as well). Moreover, DEC
13 and DEP do not enter into “joint PPAs” with QFs or independent power producers,
14 for reasons further discussed by Witness Bowman. And for that reason, when DEP
15 received this letter, DEC promptly communicated its understanding that
16 Cherokee’s request to sell its power to DEP superseded the prior negotiations with
17 DEC.¹⁴

18 **Q. DO YOU KNOW WHY CHEROKEE PURSUED A PPA WITH DEP WHILE**
19 **ALSO PURPORTING TO COMMIT ITS FULL OUTPUT TO DEC?**

20 A. I believe so. Since the Companies’ then-current 2018 IRPs projected an earlier
21 capacity need for the DEP system than for the DEC system—in 2020 vs. 2028—

¹³ DEC/DEP Keen Direct Exhibit 1, at 2; Confidential DEC/DEP Keen Direct Exhibit 2, Attachment 6.

¹⁴ DEC/DEP Keen Direct Exhibit 1, at 2; Confidential DEC/DEP Keen Direct Exhibit 2, Attachment 8.

1 Cherokee believed that it could obtain more favorable pricing from DEP than DEC
2 based on the assumption that DEP's avoided costs may be higher than DEC's.

3 **Q. HOW DID DEP RESPOND TO CHEROKEE'S OFFER TO SELL POWER?**

4 A. Like DEC before it, DEP promptly acknowledged Cherokee's offer by letter dated
5 December 21, 2018.¹⁵ The letter disputed that Cherokee had established a LEO,
6 but committed to "negotiate in good faith" towards a new five-year PPA "for the
7 purchase of Cherokee's full output of energy and capacity" to begin January 1,
8 2021. On behalf of DEP, on February 1, 2019, I sent LS Power DEP's applicable
9 avoided cost rates as of December 2018, just as Cherokee requested and
10 notwithstanding DEP's repudiation of Cherokee's claimed LEO date.¹⁶ Similar to
11 the earlier communication on behalf of DEC, I informed LS Power that the
12 applicable avoided cost rates would be available for a 60-day period.

13 **Q. DID CHEROKEE ACCEPT DEP'S OFFERED RATES OR OTHERWISE**
14 **PURSUE NEGOTIATIONS WITH DEP?**

15 A. No. Cherokee never responded to my letter dated February 1, 2019, and DEP's
16 offer subsequently expired without further negotiations.

17 **Q. WITNESS HANSON CONTENDS THAT IT WAS "DISCRIMINATORY"**
18 **FOR DEP TO REQUIRE CHEROKEE TO SECURE POINT-TO-POINT**
19 **TRANSMISSION SERVICE FROM THE CHEROKEE FACILITY TO THE**
20 **DEP SYSTEM. HOW DO YOU RESPOND?**

21 A. The Cherokee Facility is interconnected to the DEC system, and, therefore, cannot

¹⁵ DEC/DEP Keen Direct Exhibit 1, at 2; Confidential DEC/DEP Keen Direct Exhibit 2, Attachment 7.

¹⁶ DEC/DEP Keen Direct Exhibit 1, at 2; Confidential DEC/DEP Keen Direct Exhibit 2, Attachment 9.

1 access the DEP system directly. Accordingly, any energy sold by Cherokee to DEP
2 must be wheeled through the DEC system and transmitted to the DEP system. It is
3 my understanding that while PURPA requires a utility to purchase capacity and
4 energy from a non-interconnected QF, the obligation to deliver power to the utility
5 falls on the QF (i.e., Cherokee, in this case). Whether or not a utility separately
6 chooses to facilitate transmission as part of a non-PURPA market-based bilateral
7 agreement is immaterial to determining whether a QF has been treated fairly under
8 PURPA. Witness Bowman addresses this issue in more detail.

9 **Q. IF CHEROKEE WANTED TO WHEEL ITS POWER TO DEP TO SELL**
10 **POWER TO DEP, WHAT WOULD BE THE APPROPRIATE STEP TO**
11 **INITIATE THIS PROCESS?**

12 A. As discussed further by Witness Bowman, the appropriate step would be for
13 Cherokee to submit a transmission service request to wheel its power from DEC to
14 DEP under the Companies' FERC-jurisdictional Joint Open Access Transmission
15 Tariff ("OATT").

16 **Q. IN THE COURSE OF YOUR DISCUSSIONS, DID CHEROKEE EVER**
17 **FORMALLY REQUEST THAT DEC WHEEL AND TRANSMIT**
18 **CAPACITY AND ENERGY FROM THE CHEROKEE FACILITY**
19 **THROUGH THE DEC SYSTEM AND INTO THE DEP SYSTEM?**

20 A. Not that I am aware of. While Cherokee voiced its displeasure with the Companies'
21 position on transmission, as far as I know it never formally requested transmission
22 service from DEC or otherwise took any steps to arrange for delivery of power to
23 the DEP system.

1 **(B) The Companies Appropriately Responded to Cherokee’s Requests for**
2 **Information Regarding its Avoided Cost Rates and Methodology and**
3 **Further Attempts to Execute a Successor PPA**

4 **Q. DESPITE LETTING BOTH THE DEC AND DEP PPA OFFERS EXPIRE,**
5 **DID CHEROKEE CONTINUE TO PURSUE PPAs WITH DEC AND DEP?**

6 A. Yes. Although Cherokee allowed the avoided cost rates offered by DEC and DEP
7 to expire—and despite receiving notice from DEC that its pursuit of a PPA for “all
8 capacity and energy” with DEP superseded and voided the avoided cost rates
9 offered by DEC—it intermittently sought to continue discussions with both
10 Companies regarding a potential successor PPA. In May 2019—nearly two months
11 after the avoided cost rates offered by DEP expired—and again in July through
12 August 2020, Cherokee requested information from DEC and DEP regarding the
13 methodology and inputs used to calculate the Companies avoided costs rates.¹⁷ In
14 both cases, the Companies responded with the requested information by the next
15 month.¹⁸

16 **Q. WAS THE INFORMATION THE COMPANIES PROVIDED IN**
17 **RESPONSE TO CHEROKEE’S REQUESTS FOR INFORMATION**
18 **REGARDING DEP’S AVOIDED COST METHODOLOGY AND**
19 **CALCULATIONS REASONABLY TRANSPARENT?**

20 A. Yes. The Companies’ responses to Cherokee’s requests for information regarding
21 the methodology used to calculate avoided cost rates were in line with the
22 Companies’ responses to similar requests for supporting information about the

¹⁷ DEC/DEP Keen Direct Exhibit 1, at 2-3; Confidential DEC/DEP Keen Direct Exhibit 2, Attachments 10, 11, & 16.

¹⁸ DEC/DEP Keen Direct Exhibit 1, at 2-3; Confidential DEC/DEP Keen Direct Exhibit 2, Attachments 12 & 17.

1 calculation of avoided cost rates. The response letters—which are included as
2 Attachments 12 and 17 to my Exhibit 2—explained that the Companies calculate
3 avoided costs using rates and methodology approved by the Commission and
4 included in the standard offer tariff.

5 **Q. HOW DO YOU RESPOND TO WITNESS HANSON’S CLAIM THAT THE**
6 **COMPANIES SHOULD HAVE GRANTED CHEROKEE ACCESS TO THE**
7 **DETAILED INPUTS, ASSUMPTIONS, AND CALCULATIONS THAT**
8 **RESULTED IN THE PROPOSED RATES?**

9 A. DEC/DEP Witness Snider will address the regulatory aspects of this question;
10 however, it is my understanding that the information the Companies provided met
11 the level of detail that has been standard in the industry for years.

12 I would also highlight for the Commission that, in an attempt to settle and
13 finally resolve the issues in this Complaint proceeding, the Companies agreed to
14 answer additional questions regarding their avoided cost rate calculation
15 methodology on February 19, 2021 in a virtual meeting between representatives of
16 both parties. At the meeting, Witness Freund provided fulsome responses to
17 Cherokee’s inquiries in an attempt to provide added transparency and address any
18 questions regarding the methodology utilized to calculate DEC’s avoided cost.

19 **Q. ASIDE FROM REQUESTING INFORMATION REGARDING THE**
20 **METHODOLOGY AND INPUTS THE COMPANIES USED TO**
21 **CALCULATE AVOIDED COSTS, DID CHEROKEE ENGAGE IN**
22 **FURTHER NEGOTIATIONS FOR A SUCCESSOR PPA?**

23 A. Sporadically, yes. Initially, Cherokee did not communicate with either DEC or

1 DEP for nearly a year after sending its April 30, 2019 request for information.
2 However, on March 30, 2020, Cherokee asked to renew discussions for a successor
3 PPA. Shortly thereafter, Cherokee sent DEP an unsolicited non-PURPA PPA offer
4 that contained two alternative pricing arrangements, both of which were
5 significantly in excess of DEP's avoided costs.¹⁹ In June 2020, at Cherokee's
6 request, DEP provided Cherokee with updated avoided cost rates along with a
7 Commission-approved large QF form PPA for a five-year term.²⁰ The parties
8 exchanged information regarding DEP's offer throughout the summer of 2020. As
9 with all previous offers, Cherokee let this offer expire.

10 In September 2020, following discussions between the parties, DEC agreed
11 to offer Cherokee a dispatchable tolling agreement structure, similar to the 2012
12 PPA, with a 10-year term.

13 **Q. WHY DID THE COMPANIES AGREE TO INCREASE THE TERM OF**
14 **THE PROPOSED PPA FROM 5 TO 10 YEARS?**

15 A. Since Cherokee does not qualify as a small power producer under Act 62, the ten-
16 year contract length mandated in Act 62 is not applicable to Cherokee. The
17 Companies' historical practice has been to offer a five-year term for facilities like
18 Cherokee that do not qualify for the 10-year term under Act 62. However, in an
19 effort to create a contractual structure agreeable to Cherokee, DEC opted to extend
20 the previous five-year term offer to a 10-year term.

¹⁹ DEC/DEP Keen Direct Exhibit 1, at 2-3; Confidential DEC/DEP Keen Direct Exhibit 2, Attachments 13-15.

²⁰ DEC/DEP Keen Direct Exhibit 1, at 3; Confidential DEC/DEP Keen Direct Exhibit 2, Attachment 15.

1 **Q. WHY DID THE COMPANIES AGREE TO OFFER A TOLLING**
2 **AGREEMENT INSTEAD OF A MUST-TAKE AGREEMENT AS WITH**
3 **ALL PREVIOUS OFFERS?**

4 A. The Companies originally offered Cherokee a must-take, non-dispatchable PPA as
5 that is the standard Commission-approved structure offered to large QFs. The
6 must-take structure is also consistent with the 1994 PPA between DEC and
7 Cherokee that was the predecessor to the 2012 PPA. Because PURPA and Act 62
8 allow flexibility in contracting between utilities and large QFs, DEC offered
9 Cherokee a dispatchable tolling agreement in September 2020 in a good faith
10 attempt to reach a resolution between the parties and execute a new PPA before the
11 2012 PPA's December 31, 2020 termination date.

12 **Q. DID CHEROKEE ACCEPT DEC'S SEPTEMBER 2020 OFFER OF A**
13 **DISPATCHABLE TOLLING AGREEMENT WITH A TEN-YEAR TERM?**

14 Unfortunately, no. This offer was expressly rejected by Witness Hanson.

15 **Q. WERE THE SEPTEMBER 2020 AVOIDED COST RATES THE LAST**
16 **RATES OFFERED TO CHEROKEE?**

17 A. No. In advance of the February 2021 mediation in this proceeding, DEC offered a
18 10-year PPA structured as a dispatchable tolling agreement with avoided cost rates
19 calculated as of October 2020. These avoided cost rates for DEC generally aligned
20 with the timing of Cherokee's complaint and also represent the most current rates
21 available prior to the end the 2012 PPA's term. I am attaching a copy of this

1 updated avoided cost rate proposal offered to Cherokee as **Confidential Keen**
2 **Direct Exhibit 3**. Cherokee once again rejected the offer.

3 **Q. WHAT IS THE MOST ACCURATE AND APPROPRIATE RATE FOR**
4 **FUTURE PPA BETWEEN DEC AND CHEROKEE?**

5 A. As of the date of my direct testimony, the proposal offered in February 2021 is the
6 most accurate and appropriate to reflect DEC's avoided costs as of the time the
7 2012 PPA expired and, accordingly, are the most fair to Cherokee and the
8 Companies' customers.

9 **IV. CONCLUSION**

10 **Q. DO YOU AGREE WITH WITNESS HANSON THAT THE COMPANIES**
11 **"BLOCKED" CHEROKEE'S ATTEMPTS TO NEGOTIATE A**
12 **SUCCESSOR PPA?**

13 A. Absolutely not. The record is clear that DEC and DEP both actively sought to
14 execute a successor PPA with Cherokee. Throughout the more than two-year
15 discussion, DEC and DEP at all times responded promptly to Cherokee's requests
16 for avoided cost rates and calculated those rates as of the dates Cherokee requested
17 even while disputing the establishment of a LEO. The Companies were likewise
18 appropriately responsive to Cherokee's requests for information regarding the
19 Companies' avoided cost methodology.

20 In contrast, Cherokee stalled the negotiations at several junctures. Aside
21 from rejecting five different offers, Cherokee and LS Power never engaged in active
22 negotiations and instead submitted unrecognizable "counter-offers" that contained
23 rates that were much higher than either of the Companies' actual avoided costs.

1 Moreover, after requesting information from the Companies in late April 2019,
2 Cherokee let nearly a year pass without taking any action to pursue the successor
3 PPA.

4 **Q. WHY DO YOU THINK NEGOTIATIONS WITH CHEROKEE**
5 **ULTIMATELY FAILED?**

6 A. I believe the negotiations with Cherokee failed because Cherokee was unwilling to
7 accept rates that reflected the Companies' avoided costs. Based upon the
8 significantly higher rates Cherokee proffered to both DEC and DEP, it appears that
9 LS Power believes that it needs rates at 2-3 times the Companies' avoided costs to
10 make the Cherokee Facility viable. Because PURPA prohibits utilities from paying
11 rates above their avoided costs, the Companies have no flexibility to provide
12 Cherokee the significantly higher avoided cost rates that Cherokee is seeking.

13 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

14 A. Yes.